Supreme Court, U.S.
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No. 07-

071280

IN THE

Supreme Court of the United States

GOVIND S. MUDHOLKAR,

Petitioner,

v.

THE UNIVERSITY OF ROCHESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower Courts violate Plaintiff's constitutional right to due process of law by applying doctrines of issue preclusion and statute of limitations based upon allegations of new discriminatory and retaliatory pay reductions which occurred seven (7) years after a prior decision between the parties.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner, Govind Mudholkar, is the Plaintiff in the District Court proceeding and the Plaintiff-Appellant in the appeal proceeding in the U.S. Court of Appeals for the Second Circuit.

Respondent

The University of Rochester is the Respondent in this proceeding and was the Defendant in the District Court proceeding and Defendant-Appellee in the appeal proceeding in the Second Circuit of Appeals.

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The opinion of the District Court on the merits is reproduced in the Appendix at page 8a.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Second Circuit was issued on January 25, 2008.

This Petition for Certiorari is timely pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, among other things, that a person shall not be deprived of "life, liberty, or property, without due process of law".

The Fourteenth Amendment to the United States Constitution provides, among other things, that a state shall not deprive any person of "life, liberty, or property, without due process of law".

STATEMENT OF CASE

With all due respect to the lower Courts, it is the strongly held contention of the Petitioner-Plaintiff-Appellant that the prior decisions of the Court of Appeals and the District Court with respect to this case are legally irrelevant to this instant action in that they pertain to periods of time preceding the challenged discriminatory and retaliatory acts and the applicable period of time involved in this action.

It is the Plaintiff's contention, *inter alia*, that since the prior decisions of the lower Court and the U.S. Court of Appeals for the Second Circuit, as well as the administrative determinations made herein, he has suffered recent adverse employment actions, especially with regard to the inequitable reduction of his salary which merit review by this Court on the merits.

It is the Plaintiff's contention, as hereinbefore set forth, that the correction of his significant salary inequity is an important and recent basis for this action and an important matter to the Plaintiff. It should not be determined on a motion to dismiss the Complaint, based upon prior decisions which do not pertain directly hereto.

The issues extant in the instant case have never been previously decided by this or any other Court of Law as they had yet to occur when the prior decisions were made.

Accordingly, this Court is hereby asked to give its judicial consideration to the facts which have occurred since the previous decisions in this case, the latest of which occurred on March 9, 2000. Nothing in this case seeks review of those decisions. This case only seeks redress of events which have occurred after that decision and to date.

The basis for federal jurisdiction in the District Court is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000 (e), et seq., Section 296 of the New York State Human Rights Law, the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 621, et seq., and pendent jurisdiction of state law claims.

STATEMENT OF FACTS

The Complaint in the instant action does not concern events which preceded the period of time set forth in paragraph 14 of the Complaint, that is, during the period of one year prior to the Plaintiff's filing of timely charges with the New York State Division of Human Rights, which charges allege various acts of unlawful discrimination on the basis of Plaintiff's race, ethnicity, national origin and age. Said charges were also cross-filed with the Equal Employment Opportunity Commission ("EEOC"), on or about May 11, 2005, by administrative agreement.

The Defendant's motion to dismiss fails to take cognizance that Paragraph 14 of his Complaint states, as follows:

> "14. With respect to this action, Plaintiff focuses his complaints about inequitable salary and unlawful discriminatory treatment for the period of one (1) year prior to the filing of this charge of discrimination with the New York State Division of Human Rights (i.e., May 11, 2004), up to and including the time of trial."

The Defendant's motion entirely fails to note that the applicable time period in this case was not involved in any of the previous administrative or judicial decisions which the Plaintiff may have been involved in.

The allegations of salary inequity, unlawful employment discrimination and retaliation involved herein should not be determined as a matter of law based upon prior decisions. Otherwise, a Defendant who may have won a prior case will have a free pass to unlawfully discriminate and/or retaliate against an individual, such as this Plaintiff, after the making of a prior judicial decision, without any recourse by said individual.

It is respectfully submitted that just because in the past a Defendant may have won favorable decisions involving periods of time about which a present action does not pertain does not foreclose, as

a matter of law, judicial review of the merits of a new action based upon new facts, as are involved herein.

For purposes of "**BACKGROUND**" only, Plaintiff's Complaint pleads certain facts involved in his prior claims. However, in at least two (2) paragraphs of the present Complaint, that is, paragraphs 14 and 22, it is made very clear that the focus of this Complaint is not the events previously litigated and/or decided, but events which did not occur until after the previous decisions were made. Additionally, paragraphs 5 and 6 of the Plaintiff's Complaint make reference to the applicable dates involved herein, all of which post-date the prior decisions involved herein.

Accordingly, with respect to this case, these previous decisions are legally irrelevant as they did not relate to nor could they relate to the events complained of in his action, as they had yet to occur.

For example, paragraph 22 of the Plaintiff's Complaint herein states, as follows:

"During 2004, a grievance committee issued a report substantiating the Plaintiff's allegations of an unfairly low salary. Notwithstanding this finding, the wage inequity herein alleged continues to date."

None of the prior decisions relied upon by the Defendant in any way concern the Defendant's

grievance committee report issued in 2004, which, in fact, found that a wage disparity did exist in Plaintiff's case, as said report had yet to be written when the prior decisions relied upon by the Defendant were made.

For purposes of factual background only, certain facts underlying Plaintiff's employment are relevant hereto, such as Plaintiff's date of hiring as a University of Rochester faculty member, as an Assistant Professor in 1963, his promotion to Associate Professor and the grant of tenure to the Plaintiff in 1967, and his promotion to the rank of Full Professor of Statistics and Biostatistics in 1972. These background facts do not change the essential focus of this action which concerns recent events and not events previously decided or which could have been decided as they had yet to occur.

Plaintiff is a fully functioning and productive member of the Defendant's faculty. He has written and made significant contributions to his academic fields in Statistics, BioStatistics and Medical Science.

He has taught and continues to teach a full load of graduate level courses, mentoring Ph.D. students, writing and conducting a significant amount of research training with graduate students.

The essence of the instant Complaint in this action is that notwithstanding his long tenure of good-standing as a Full Professor in the Defendant's

employ, during the applicable period of time herein, the Defendant has further reduced his salary to a significantly lesser level than that of his colleagues in comparable positions and treated the Plaintiff differently in an unlawful discriminatory and retaliatory fashion.

It is for these recent violations of the Plaintiff's legal rights, after the applicable time periods involved in the prior decisions, that he seeks redress for in this action. There is nothing in the prior decisions which relate in any way to the facts and circumstances involved herein and they do not foreclose this action.

Paragraph 15 of the instant Complaint, states as follows:

"Plaintiff is paid considerably below the average of his peer Full Professors at The University of Rochester, especially in light of his length of tenure and academic accomplishments."

Said paragraph 15 of this Complaint, as all of the other allegations in this Complaint, relate entirety to the time period beginning in May, 2004, which was not previously determined such that *res judicata* and/or collateral estoppel should not, as a matter of law, have any bearing thereon.

In support of his Complaint, Plaintiff has attached various documents to his Affidavit in Opposition which documents fall outside the

applicable time periods in the prior decisions and are fully within the time periods applicable to this case.

For example, Plaintiff incorporated, as Exhibit A, a letter dated October 14, 2005, wherein he is recognized as "an outstanding scholar in the area of mathematical statistics."

Plaintiff incorporated, as Exhibit B, a statement from the Forum of Interdisciplinary Mathematics (2004), honoring the Plaintiff as a Keynote Speaker.

Plaintiff incorporated, as Exhibit D, his written response, dated June 16, 2003, to then President Thomas H. Jackson, concerning the aforesaid Report of the Appeal Committee. The University of Rochester has named a new President, Joel Seligman, who, upon information and belief, has not yet dealt in a substantive way with any of the concerns raised in Plaintiff's Complaint in this action.

Plaintiff incorporated as Exhibit E, the letter of former President Thomas Jackson, dated June 30, 2003, declaring this matter closed.

Accordingly, there is no legal reason whatsoever for this action to have been dismissed based upon prior decisions or prior litigation which are not germane to the instant action and which do

not relate to the time period involved herein.

Plaintiff incorporated, as Exhibit F, a Statement for the years 2005-2006 from the American Statistical Association ("ASA") which tracks Academic Statistician's salaries, such as that of the Plaintiff.

Said Statement demonstrates that a Full Professor, such as the Plaintiff with years in rank of 31 or more years, in the "Median" quartile, should be earning a minimum of $118,650.00 dollars per year.

Plaintiff's annual earnings, as of June, 2004, four (4) years after the decision of Judge Telesca in the prior action between these parties, are in the amount of $41,361.00, representing one-half of the base salary assigned to Plaintiff in the amount of $82,722.00.

Plaintiff's Exhibit G, the February, 2006 salary survey contained in the ASA's membership magazine which even more starkly raises the issue of salary disparity in Plaintiff's case, showing a median salary for Full Professors with seven (7) or more years in rank should be in excess of $151,000.00 per year.

Plaintiff incorporated, as Exhibit H, the correspondence from Dean Thomas J. LeBlanc, dated "June 2004", setting forth his current salary in the amount of $41,361.00.

Plaintiff further incorporated, as Exhibit I, dated June 11, 2002, a letter from Dean Thomas J. LeBlanc, states that Plaintiff's salary in that year would be $53,005.00, representing two-thirds of his then base academic salary.

Thus, based upon the Defendant's own unilateral actions, Plaintiff's salary has been reduced from two-thirds of a base academic salary to one-half of said rate. That is, using the Defendant's own inadequate and disparate base salary, the Plaintiff has suffered a further unacceptable reduction in pay from $53,005.00 to $41,361.00.

It is the Plaintiff's contention that this recent adverse action by the Defendant constitutes a recent discriminatory employment action taken against him by the Defendant as well as constituting unlawful Retaliation by reason of the further unjustified reduction in his salary of $11,644.00 per year.

Nothing has been done by the Defendant to correct this recent adverse punishment and Retaliation of the Plaintiff by the University's payment to him of an inadequate and inequitable salary. This wage inequity is further exacerbated by the University's unilateral decision to reduce his salary from two-thirds of a base salary to one-half of a base salary which base salary, based upon the documents provided herewith is already at least $35,928.00, if not at least in excess of $68,000.00 per year too low.

That is, the difference between the "ASA" Median salary for a Full Professor with 31 or more years in rank in the "Median" quartile, who should be earning a minimum of $118,650.00 dollars per year (if not $151,410.00, as stated in Exhibit G) and the base salary assigned to the Plaintiff by the University, in the amount of $82,722.00.

It is respectfully submitted that these actions by the Defendant constitute a significant adverse employment action taken against him all of which has occurred since the most recent decision of this Court on March 9, 2000. This wage disparity and wage inequity are undisputed at this point in time. Moreover, for purposes of deciding this motion to dismiss, the truth of said wage inequity and adverse employment action must be assumed to be true, for purposes of this motion.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The instant application for a Petition of Certiorari seeks to bring up for review an important federal constitutional question pertaining to due process of law which should be settled by this Court in accordance with Rule 10 of the Rules of the Supreme Court of the United States in that the lower Courts deprived the Plaintiff of his day in Court to prove allegations of employment discrimination and

retaliation based upon facts which occurred after prior decisions of the lower Courts and which were never adjudicated in said prior decisions as they had yet to occur.

ARGUMENT

POINT I: NEITHER THE DOCTRINES OF *RES JUDICATA* NOR COLLATERAL ESTOPPEL ARE GERMANE TO THE FACTS OR ISSUES IN THE INSTANT CASE

While it is true that the doctrines of *Res Judicata* and/or collateral estoppel preclude a party from re-litigating any issue or defense that "could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided." Woods v. Dunlop Tire Corp., 972 F.2d 36, 38 (2nd Cir. 1992) cert den. 506 U.S. 1053 (1992), the issue of whether the first action will have preclusive effect on the second action essentially turns on whether the same evidence is needed to support both claims and **"whether the facts essential to the second were present in the first."** Woods, supra, 972 F.2d at 38; NLRB v. United Technologies Corp. 706 F.2d 1254, 1260 (2d Cir. 1988). (Emphasis Added.)

The reason that neither *Res Judicata* nor collateral estoppel may be said to apply to this second action is because the claims which arise in

this second action, especially with reference to the recent further reduction in Plaintiff's salary could not have been raised in the first action as they had yet to occur. Please see Allen v. McCurry, 449 U.S. 90 (1980).

As argued by the Defendant, one of the principal factors to determine the applicability of the aforesaid doctrines of issue preclusion is whether the underlying facts in the two cases are "related in time". This is the distinguishing point which sets this case apart from the others relied upon by the Defendant and the lower Courts. That is, because the underlying facts in this second action are unrelated in time to the facts in the first action.

This second action only pertains to the period of time since May, 2004, and to the new events and new facts which have transpired since then. This Court's decision in the first action occurred on March 9, 2000. The facts complained of in the second action did not begin to occur until years after the first action was litigated and decided, making the doctrine of issue preclusion inapplicable.

"It is the identity of facts surrounding the occurrences which constitutes the cause of action, not the legal theory..." Berlitz v. Sch. of Languages of America, Inc. v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980). (Emphasis Added).

Whatever legal theory is advanced, when the

factual predicate upon which claims are based are substantially identical the claims are deemed to be duplicative for purposes of *res judicata*." Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1234 (2d Cir.) Cert den 434 U.S. 903 (1977).

For example, where a Plaintiff fails to include a claim under 28 U.S.C. 1983 with a Title VII action alleging gender discrimination based upon the same facts and the same transactions, issue preclusion has been upheld. Nilsen v. City of Moss Point, Miss., 701 F.2D 556, 559 (1983). Also, failure to include race discrimination and a 28 U.S.C. 1983 action have lead to issue preclusion in a subsequent lawsuit based upon the same facts and the same set of transactions. Kremer v. Chemical Constr. Corp., 456 U.S. 491 (1982).

Similarly, where a claim under the Rehabilitation Act was omitted in a Title VII action issue preclusion was also upheld because the Plaintiff could have included such a claim based upon the same factual predicates. See e.g., Miller v. U.S. Postal Service, 825 F.2d 62 (5th Cir. 1987).

Here, however, the Plaintiff could not have advanced or even known about the issues pertaining to his recent reduction of pay for allegedly discriminatory and retaliatory reasons because these facts had not yet occurred when the first action was brought or decided.

Were the law any different, a party to a lawsuit would be forever precluded from bringing a new action based upon new facts simply because a prior action between the parties involving different facts was previously decided. Surely, this is not the law nor should it be. This issue needs to be settled by this Court as it presents an important and compelling set of circumstances which otherwise would deprive a Plaintiff of his day in Court on the merits. *Res Judicata* seeks to prevent multiple lawsuits arising out of the same facts. It does not seek to prevent multiple actions between the same parties concerning different or new facts which created new wrongs.

It is submitted that Plaintiff's allegations that he has suffered new wrongs as a result of new facts engaged in by the Defendant do not preclude this lawsuit. We are not dealing with a re-packaging of the same set of facts under a new legal theory. We are dealing with a new set of facts altogether.

Accordingly, the decisions of the lower Courts granting Defendant's Motion to dismiss must be reversed and remanded.

POINT II: THE DOCTRINE OF THE STATUTE OF LIMITATIONS IS INAPPLICABLE TO THIS CASE.

The applicable facts and dates for this Court to determine whether the Statute of Limitations is

pertinent hereto are as follows:

Plaintiff filed his Complaint with reference to this action in the New York State Division of Human Rights on May 11, 2005.

In said verified Complaint, the Plaintiff clearly, in paragraph 3 thereof, avers that his employer has "engaged in a continuing course of discrimination". In paragraph 4 thereof, he avers that he has been wrongfully and unlawfully discriminated against by his employer, The University of Rochester, with respect to his salary in that he is being paid at a rate of less than three times that of some of his recent former students and much less than his present colleagues.

In his submissions to the lower Court in opposition to the Defendant's Motion to dismiss, he attaches as evidentiary exhibits thereto, undisputed documentation from the Defendant's administration, which demonstrates that his current salary was set in June, 2004, at a rate of $41,361.00, representing 50% of the then base salary for a Full Professor.

Previous thereto, in June, 2002, Plaintiff's salary was set at a rate of $43,005.00, which represented a rate of two-thirds of the then base salary for Full Professors.

Plaintiff is complaining about this further reduction in his salary which occurred for no

justifiable reason, except as he asserts which is that his employer engaged in a continuing course of unlawful discrimination and retaliation against him.

His verified Complaint in the Division of Human Rights was filed on May 11, 2005, as aforesaid. It was certainly timely with respect to his complaint about a further salary reduction which occurred in June, 2004, less than one year prior thereto. Please see the Executive Law of the State of New York, i.e., the New York State Human Rights Law, in Section 297(5), setting forth the State statutory period of limitations of one (1) year prior thereto.

Accordingly, there can be no meritorious legal issue which may assert that the Plaintiff's complaint in this action is or was untimely.

A State administrative complaint alleging unlawful discrimination in employment may be considered dual-filed with the United States Equal Employment Opportunity Commission ("EEOC"). The federal statutory period of limitations, had he filed with the EEOC initially, which he did not, would have been 300 days (42 USC 2000e-5), rather than one (1) year for a State filed Division of Human Rights administrative complaint. [Executive Law 297(5)]. Thus he is not precluded from challenging in this proceeding unlawful acts of discrimination and retaliation within the State statutory period as he filed there initially and in a timely fashion.

This is exactly the case here.

Accordingly, the Plaintiff's complaint in this case is timely and must be determined on the merits at trial and not upon a Motion to dismiss by reason of the statute of limitations. The lower Courts were incorrect in this regard and this case must be reversed and remanded.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: April 8, 2008

Respectfully submitted,

BILGORE, REICH, LEVINE & KANTOR

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JANUARY 25, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

06-4732-cv

GOVIND S. MUDHOLKAR,

Plaintiff-Appellant,

v.

UNIVERSITY OF ROCHESTER,

Defendant-Appellee.

January 25, 2008

Present AMALYA L. KEARSE and PETER W. HALL, Circuit Judges, and JED S. RAKOFF, District Judge.*

SUMMARY ORDER

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED.**

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* The Honorable Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Appellant appeals from the September 27, 2006 decision and order of the district court dismissing his complaint as barred by claim preclusion, as time-barred, and for failure to state a claim. We assume the parties' familiarity with the facts and proceedings below.

We review de novo the district court's decisions as to claim preclusion, the statute of limitations, and dismissal for failure to state a claim. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.2007) ("We review a district court's dismissal of a complaint pursuant to Fed.R.Civ.P. 12(b)(6) de novo, accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor."); *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir.2005) (per curiam) ("We review *de novo* the district court's application of the principles of *res judicata*."); *United States v. Domino Sugar Corp.*, 349 F.3d 84, 86 (2d Cir.2003) (noting that where the facts as to the timing of the alleged occurrences are not in issue, application of the statute of limitations is a question of law to be reviewed de novo).

Under the doctrine of claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Claims are precluded, even if not raised in the prior action, if "the party against whom the doctrine is asserted had a full and fair opportunity to litigate" them at that time. *EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 626 (2d Cir.2007).

Appendix A

The district court correctly found that Appellant's complaint, asserting that Appellee discriminated against Appellant on the basis of his race, ethnicity, national origin, color, and age in violation of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the Age Discrimination in Employment Act, and the Equal Pay Act, was precluded by the judgment entered in a separate lawsuit that Appellant filed against Appellee in the federal district court (W.D.N.Y., Telesca, *J.)* in 1997. Allegations challenging the continuing disparate effects of discriminatory conduct that has been previously alleged do not constitute allegations of a new violations. *See Ledbetter v. Goodyear Tire & Rubber Co.*, — U.S. ——, ——, 127 S.Ct. 2162, 2168, 167 L.Ed.2d 982 (2007). Because a claim that a defendant has engaged in a forbidden employment practice that denies an employee equal pay accrues when the practice is initiated, *see id.* at 2167, the adjudication of that claim forecloses a later claim challenging the effects of that practice. Here, as the district court noted, "the current Complaint is virtually identical to the complaint filed in this Court in 1997," except for the new allegations in paragraphs 14 and 22. Those new paragraphs do not assert a new claim. The current Complaint having alleged in paragraph 13 that Mudholkar "has *consistently* been paid less salary" (emphasis added), paragraph 14 simply states, without alleging any new facts, that the present complaint "focuses" on the period beginning May 2004. And paragraph 22 alleges that the wage inequity has "continue[d]." Thus, as the district court noted, every claim in the complaint-with the exception of the Equal Pay Act claim, which fails for

other reasons discussed below-was raised and resolved in the prior action. "Dismissal under Fed.R.Civ.P. 12(b)(6) is appropriate when a defendant raises claim preclusion . . . as an affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." *Conopco, Inc. v. Roll Int'l*, 231 F.3d 82, 86 (2d Cir.2000). Though Appellant argues that Paragraph 14 of his complaint, which was filed in January 2006, focuses his claims on events that had occurred since May 2004, long after the judgment dismissing his 1997 lawsuit, the complaint fails to allege a single event or transaction during that period. Appellant's reliance on a June 2004 pay reduction also fails. Although Appellant raised the pay reduction in his opposition to Appellee's motion to dismiss, he failed to allege it in his complaint. Nor does the alleged 2004 grievance committee report alter the conclusion. Although the report might be relevant evidence of past discrimination, the complaint itself contains no new factual allegations that were not resolved in the 1997 lawsuit, and thus "from the face of the complaint" it is clear that Appellant's claims are barred by claim preclusion. Were we to look beyond the complaint, we would find in the record only a grievance committee report issued in 2002; that report, of course, does not even fall within the window (roughly May 2004 well into 2006) on which the complaint purports to focus. And to the extent that Appellant has adduced any facts occurring since 1997, those facts "do not, either by themselves or to any degree not already demonstrated by the overlapping facts, establish" a claim. *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 113 (2d Cir.2000).

We also affirm the district court's finding that Appellant's Title VII claims were time-barred. "In states such as New York that have an agency with the authority to address charges of discriminatory employment practices, the statute of limitations for filing a charge of discrimination with the EEOC is 300 days." *Butts v. City of N.Y. Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1401 (2d Cir.1993) (citing 42 U.S.C. § 2000e-5(e)), *superceded by statute on other grounds*, Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat. 1072. Although Appellant argues that because he initially filed his complaint with the New York State Division of Human Rights ("DHR") he is subject to New York State's one-year statute of limitations, N.Y. Exec. Law § 297(5), his argument reflects a misunderstanding of the worksharing agreement between the Equal Employment Opportunity Commission ("EEOC") and the DHR. New York State's one-year statute of limitations applies to *state* claims filed with the DHR. The 300-day statute of limitations applies to *Title VI* claims filed with the EEOC through the DHR, its agent. Filing the federal claim through the agent (DHR) rather than directly with the EEOC does not change the statutory requirement that the claim be filed within 300 days. Given this 300-day statute of limitations, Appellant's claim is time-barred because his complaint alleges no "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire," *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), occurring within 300 days of his complaint. Even if Appellant's claim is framed as a hostile work environment claim, which would involve an ongoing

course of conduct over "a series of days or perhaps years," *id.* at 115, he has failed to "file a charge within 180 or 300 days of *any act* that is part of the hostile work environment," *id.* at 118 (emphasis added).

The district court also correctly dismissed Appellant's Equal Pay Act claim for failure to state a claim. By its terms, the Equal Pay Act states that "[n]o employer having employees subject to any provisions of this section shall discriminate ... between employees on the basis of sex." 29 U.S.C. § 206(d)(1). Appellant admittedly raises no sex discrimination claims in his Complaint or supporting documentation, instead arguing for "the expansion of existing law and/or the establishment of new law" because racial, ethnic, and age discrimination are "no less reprehensible" than sex discrimination. Courts generally give statutory text its "ordinary, contemporary, common meaning," *Williams v. Taylor*, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (internal quotation marks omitted), and "[o]ur inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,' " *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). The Equal Pay Act is unambiguous in limiting its application to discrimination on the basis of sex, and that limitation does not render the broader statutory scheme incoherent. Given the clarity of the statute, the district court was correct in dismissing Appellant's Equal Pay Act claim for failure to state a claim. The assertion of an

Equal Pay Act claim in a complaint that did not allege sex discrimination in any fashion was frivolous, as is the appeal of the district court's dismissal of that claim. Mudholkar and his attorney, Mr. Kantor, are warned that the pursuit of such frivolous claims in the future may expose them to sanctions. *See, e.g.*, Fed.R.Civ.P. 11; Fed. R.App. P. 38; 28 U.S.C. § 1927.

We have considered all of Appellant's claims and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the District Court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By: s/ Franklin Perri

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED AND FILED SEPTEMBER 27, 2006

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

06-CV-6010T

GOVIND S. MUDHOLKAR,

Plaintiff,

v.

THE UNIVERSITY OF ROCHESTER,

Defendant.

Sept. 27, 2006

DECISION and ORDER

MICHAEL A. TELESCA, District Judge.

INTRODUCTION

Govind S. Mudholkar ("plaintiff") brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e), *et seq.*, ("Title VII"), Section 296 of the New York State Human Rights Law ("Human Rights Law"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.*, ("ADEA") and the Equal Pay Act of 1963, as amended,

29 U.S.C. § 201, *et seq.*, ("Equal Pay Act"), against the defendant University of Rochester (the "University" and/or "defendant") claiming that the University discriminated against him on the basis of his race, ethnicity, national origin, and age, and has retaliated against him for opposing the allegedly discriminatory treatment he received.

Defendant moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on grounds that: (1) plaintiff's claims of discrimination and retaliation on the basis of his race, ethnicity, national origin and age are barred by the doctrine of *res judicata;* and (2) plaintiff has failed to establish a prima facie case of discrimination under the Equal Pay Act. Specifically, defendant argues that plaintiff is asking this court to re-adjudicate facts and claims that have been fully litigated in prior actions before the U.S. Court of Appeals for the Second Circuit, the U.S. District Court for the Western District of New York, the Equal Employment Opportunity Commission ("EEOC") and the New York State Division of Human Rights (the "Division of Human Rights").

Plaintiff objects to defendant's motion, and claims that the principle of *res judicata* does not apply to the current Complaint because all of the allegations in the Complaint relate to the period beginning in May 2004. In addition, while plaintiff admits that the Equal Pay Act prohibits only gender discrimination claims, he argues that the Equal Pay Act should be expanded in scope to include ethnicity, race, age and national origin

claims. For the reasons set forth below, defendant's motion to dismiss is granted and plaintiff's complaint is dismissed in its entirety with prejudice.

BACKGROUND

I. *Procedural Background*

A. *Prior Actions Filed by Plaintiff*

In the fall of 1992 plaintiff filed a grievance with the University claiming that it discriminated against him by: paying him less than comparable professors; excluding him from participation within the department; discriminating against colleagues who associated with him, and discriminating against graduate students whom he advised. A grievance committee investigated plaintiff's charges and on April 9, 1994 issued a 17-page report finding that plaintiff's complaints of discrimination were unsubstantiated. The committee also concluded that while plaintiff's salary was slightly lower than salaries of comparable professors, plaintiff had not been discriminated against in his salary.

In April 1996, plaintiff filed an administrative charge with the EEOC claiming that he had been discriminated against on the basis of his race, religion, and national origin. He claimed that as a result of the discrimination he was paid less than other professors, and had been given less-desirable assignments. The EEOC dismissed plaintiff's charge.

Plaintiff then filed a second administrative charge with the EEOC in 1997 claiming that he was being discriminated against on the basis of his race, religion, age, color, and national origin. Plaintiff also claimed that the University retaliated against him for complaining of discrimination. The EEOC dismissed his second charge and issued a "Notice of Dismissal and Right to Sue" letter.

In 1997 plaintiff also commenced an action in the Federal District Court for the Western District of New York against the University alleging numerous causes of action. Plaintiff alleged that he had been discriminated against because of his national origin, race, religion, color, age and by paying him less than other professors all in violation of Title VII, the Human Rights Law, and the ADEA. Plaintiff also alleged discriminatory retaliation in violation of the above provisions. On March 7, 2000, this Court granted the University's motion for summary judgment and dismissed plaintiff's claims finding that plaintiff "failed to establish that any adverse action was taken against him," and failed to show any "circumstances giving rise to an inference of discrimination." In a decision dated October 16, 2000, the Second Circuit Court of Appeals affirmed this Court's holding and issued an order dismissing plaintiff's appeal.

During the pendency of his claim in federal court, plaintiff continued to make discrimination complaints against the University. In response to his complaints, the University undertook an additional investigation of

plaintiff's claims of race, ethnic, age and unequal pay discrimination. On June 24, 1998, the committee tasked to investigate plaintiff's claims issued a report, which concluded that allegations made by plaintiff consisting of discrimination and unequal pay were "without objective basis and merit." Thereafter, plaintiff instituted a formal grievance appeal based upon the findings of the committee in its June 24, 1998 report. On December 5, 2002, the committee responsible for the appeal issued a report concluding that there was no evidence of racial ethnic or age discrimination and no evidence of discrimination in pay.

B. *Recent Actions Filed by Plaintiff*

Most recently, on May 11, 2005, plaintiff filed a verified complaint with the Division of Human Rights claiming that he had been discriminated against on the basis of his race, ethnicity, national origin, color and age in violation of Title VII, the Human Rights Law, and the ADEA. Plaintiff's verified complaint to the Division of Human Rights was also cross-filed with the EEOC. Yet, as the University pointed out, plaintiff concluded his verified complaint by stating under oath:

> I have not commenced any other civil action, nor do I have an action pending before any administrative agency, under any state or local law, based upon this same unlawful discriminatory practice.

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On June 30, 2005 the Division of Human Rights issued a Determination and Order dismissing plaintiff's complaint for Lack of Jurisdiction because "the issues of [this] case have already been adjudicated in Federal Court." The EEOC also dismissed plaintiff's allegations of discrimination against the University on October 13, 2005 by adopting the Division of Human Rights' decision dismissing plaintiff's complaint for lack of jurisdiction.

On January 4, 2006, plaintiff filed the Complaint in this action alleging that the University violated his rights under Title VII, the Human Rights Law, and the ADEA by discriminating against him on the basis of race, ethnicity, national origin and age and by paying him a lower salary compared to other professors. But for the language in paragraphs 14 and 22[1] of plaintiff's Complaint, the current Complaint is virtually identical to the complaint filed in this Court in 1997. Paragraphs 14 and 22 of plaintiff's opposition papers explain that the focus of the current Complaint are not the events previously litigated and/or decided but events that did not occur until after the previous decisions were made

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1. Paragraph 14 states: "With respect to this action, Plaintiff focuses his complaints about inequitable salary and unlawful discriminatory treatment for the period of one (1) year prior to the filing of this charge of discrimination with the New York State Division of Human Rights (i.e., May 11, 2004), up to and including the time of trial.

Paragraph 22 states: "During 2004, a grievance committee issued a report substantiating the Plaintiff's allegations of an unfairly low salary. Notwithstanding this finding, the wage inequity herein alleged continues to date."

i.e. beginning in May 11, 2004. Thus, plaintiff argues that the previous decisions are "legally irrelevant as they did not relate to nor could they relate to events complained of in this action, as they had yet to occur."

II. *Factual Background*

Plaintiff claims that the facts germane to this case relate to the time period beginning in May 2004.[2] In essence, plaintiff claims that since May 2004, the University has further reduced his salary to a lesser level than that of his colleagues in comparable positions and for discriminatory reasons despite his long tenure and good standing as a full professor on the University's faculty. Plaintiff claims that he teaches a full load of graduate level courses and mentors PhD students and writes and conducts research training with graduate students. However, plaintiff states that his base salary is $82,722 which is lower than the median salary of $118,650 paid to professors in his academic level. Plaintiff claims that the wage disparity and reduction in salary constitute adverse employment actions as well as retaliation by the University against the plaintiff for pursuing his previous complaints against the University.

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2. Any prior relevant factual background relating to this case has been discussed in extensive detail in this Court's prior Decision and Order dated March 7, 2000.

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DISCUSSION

I. *Defendant's Motion to Dismiss*

Rule 12 (b)(6) of the Federal Rules of Civil Procedure provides for dismissal of the complaint where the plaintiff has failed to state a claim upon which relief can be granted. When evaluating a Rule 12(b)(6) motion, the court must ascertain, after presuming all factual allegations in the pleading to be true and viewing them in the light most favorable to the plaintiff, whether or not the plaintiff has stated any valid ground for relief. *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2nd Cir.1993), *cert. denied*, 513 U.S. 1014, 115 S.Ct. 572 (1994). The court may grant a Rule 12(b)(6) motion only where " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir.1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

"It is appropriate to determine whether a complaint is barred by res judicata on a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)." *Gould v. Nat'l Westminster Bank, U.S.A.*, 2000 WL 1339292, *3 (D.Conn.,2000)(citing *Southard v. Southard*, 305 F.2d 730, 732 & n. 1. (2d Cir.1962); *See also Day v. Moscow* 955 F.2d 807, 811 (2d Cir.), *cert. denied*, 506 U.S. 821 (1992) (court may consider a properly dismissed complaint upon which the defense of res judicata was based in motion pursuant to Fed.R.Civ.P. 12(b)(6)). For the reasons set forth below, I hereby grant defendant's motion to dismiss plaintiff's Complaint with prejudice.

II. *Plaintiff's Claims are Barred by the Doctrine of Res Judicata*

The doctrine of *res judicata*, or claim preclusion, provides that "a final judgment on the merits of an action precludes the parties . . . from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citations omitted); *LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester*, 40 F.3d 587 (2d Cir.1994); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir.1992), *cert. denied*, 506 U.S. 1053 (1992) ("res judicata or claim preclusion 'prevents a party from litigating any issue or defense that could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided.' " (quoting *Clarke v. Frank*, 960 F.2d 1146, 1150 (2d Cir.1992).

The purpose of the doctrine is to provide finality to parties who have come before the courts to resolve their disputes. *See Allen*, 449 U.S. at 94 (purpose of the res judicata defense is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication"). Accordingly, the doctrine prevents relitigation of claims asserted in a previous action, as well as claims that could have been asserted in that action. *See Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (under the doctrine of *res judicata*, a judgment entered on the merits in a previous action "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not

only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose").

To determine whether or not the doctrine of *res judicata* applies to preclude litigation, the court must determine whether or not the judgment in the previous action was: "(1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action." *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2nd Cir.2001)(citing *Anaconda-Ericsson Inc. v. Hessen (In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir., 1985) To determine whether or not claims in the second lawsuit involve "the same cause of action", courts determine whether or not "the same transaction or a connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second [action] were present in the first [action]." *NLRB v. United Tech.*, 706 F.2d 1254, 1260 (2nd Cir.1983); *See also Salerno v. Leica Inc.*, 139 F.Supp.2d 377, 383 (W.D.N.Y.2001) (quoting *Interoceanica Corp. v. Sound Pilots*, 107 F.3d 86, 90 (2d Cir.1997) (courts "must look to whether the underlying facts of the two cases are related in time, space, origin, or motivation, whether they would have formed a convenient trial unit, and whether their treatment as a unit would have conformed to the parties expectations").

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In the instant case, summary judgement on the merits was issued by this Court, having jurisdiction over the parties and the subject matter on March 7, 2000 in favor of the University dismissing plaintiff's Complaint, which alleged discrimination and unequal pay on the basis of race, ethnicity, national origin and age. Moreover, the prior action in which the judgment was rendered also involved the same parties. Because three of the four factors for applying the doctrine of *res judicata* have been met, this Court need only determine whether or not the prior action involved "the same cause of action."

Based on the allegations in the prior Complaint, and the entire record from the prior court proceedings, I find that the allegations raised by plaintiff in this Complaint are essentially identical to those raised in the prior federal court action. The claims in this case (that the University violated federal law by discriminating plaintiff and not paying him equally compared to his peers), arise out of the same facts that were alleged in the prior federal court action.

Every discrimination claim alleged by plaintiff in his current action had been alleged in the first complaint and are identical to allegations first presented to the University in 1992. Plaintiff had an opportunity to fully and fairly litigate his claims of discrimination in the prior action. Indeed, plaintiff's current allegations are identical to allegations dismissed by the EEOC in 1996 and 1997 with a finding of no probable cause and dismissed by the University's Grievance Proceedings in 1998 with a finding of "no objective bases or merit."

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Plaintiff exhaustively litigated his claims before this Court, resulting in dismissal of his Complaint on March 7, 2000, and thereafter affirmed by the U.S. Court of Appeals for the Second Circuit on October 4, 2000. Subsequently, and notwithstanding the dismissal of his claims, plaintiff filed the same complaints, which were dismissed by the University's Appeal Committee in 2002; dismissed by the Division of Human Rights on June 30, 2005 and dismissed by the EEOC on October 13, 2005 with a determination that plaintiff's issues had already been adjudicated in federal court.

Plaintiff argues that *res judicata* does not apply in this case because the claims arising in this action, particularly with regard to plaintiff's recent salary reduction could not have been raised in the prior federal proceeding as they had yet to occur. Plaintiff has characterized his current action as seeking relief solely for events, which began in May 2004 and thus could not have been raised in the first action, which was decided on or about March 7, 2000. This argument is untenable. Plaintiff does not allege any new facts occurring on or after May 2004 that would support his claims of salary reduction and unequal pay. Indeed, plaintiff reasserts and relies on the same facts, which he raised and were litigated and decided in his prior action before this Court. Accordingly, I find that plaintiff's action is barred by the doctrine of *res judicata*.

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III. *Plaintiff's Claims are Barred by the Statute of Limitations*

Defendant alleges that plaintiff's Title VII claims alleging unlawful discrimination and unequal pay on the basis of age, race, ethnicity and national origin are untimely. Title VII claims are limited to those occurring within 300 days of plaintiff's EEOC discrimination charge. *See* 42 U.S.C. § 2000e-5(e)(1) (2003). Plaintiff's discrimination charge with the Division of Human Rights was filed on May 11, 2005 and cross-filed with the EEOC the following day. Accordingly, the University argues that any of plaintiff's Title VII claims occurring before July 15, 2004, are time-barred. *See Pikulin v. City Univ. of N.Y.*, 176 F.3d 598, 599 (2d Cir.1999).

Plaintiff asserts however that under Executive Law § 297(5) of the New York State Human Rights Law the statute of limitations is one-year, which would run from May 11, 2004. *See McKinney's Executive Law § 297(5).* According to plaintiff this is significant because the reduction in pay that he suffered in June 2004 is within the 365-day statutory period.

Title VII requires that complaints of discrimination be filed with the EEOC within 300 days after the alleged discriminatory act. 42 U.S.C. § 2000e-5(e). Plaintiff filed his Title VII administrative complaint in May 2005. Thus claims of discrimination prior to July 2004 (with respect to alleged race, color, national origin, and ethnicity discrimination) are barred by the statute of limitations provision. Many of plaintiff's allegations of unlawful

discrimination and unequal pay involve incidents that took place prior to May 2004. In addition, plaintiff relies on a letter from the University dated June 11, 2002 in support of various unequal pay assertions. *See* Plaintiff's Mem. at 7 Ex. H. Significantly, plaintiff concedes that a University Grievance Report issued in 2002 "forms a significant basis for [supporting] this action." *See* Plaintiff's Mem. *id.* at 6. These documents are irrelevant since plaintiff's salary claims were decided in his prior action and are time-barred by the statute of limitations.

IV. *Equal Pay Act Claims*

Plaintiff's remaining claim for relief, which has not previously been adjudicated by this Court alleges that the University has denied him his rights under the Equal Pay Act due to his race, ethnicity, national origin and age. However, the Equal Pay Act prohibits only gender-based discrimination.

To establish a prima facie violation of the Equal Pay Act under 29 U.S.C. § 206(d), the plaintiff must prove that the employer pays different wages to members of another sex for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. *See Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520 (2d Cir.1992); *Anderson v. State Univ. of NY*, 107 F.Supp.2d 158, 163 (N.D.N.Y.2000). The statute does not address discrimination on the basis of race, ethnicity, national

origin, age or any other protected class. *See Conner v. Togo D. West, Jr.*, 2002 U.S.Dist. LEXIS 5804 (W.D.Mich., 2002). Accordingly, the Equal Pay Act prohibits the University from discriminating on the basis of sex in the payment of wages. *See* 29 U.S.C. § 206(d)(1) (the Equal Pay Act prohibits discrimination "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work . . .").

Here, plaintiff does not allege that he is receiving a lower wage compared to a female professor who is doing substantially equal work. In fact, plaintiff admits that the language of the Equal Pay Act prohibits wage discrimination only on the basis of gender. While plaintiff argues that "he is entitled to make a serious non-frivolous argument" in order to expand the ambit of the Equal Pay Act and include claims relating to ethnicity, race, age and national origin (*see* Plaintiff's Memo, p. 13), he does not offer any reasonable basis for extending the scope of the Equal Pay Act. *See In re Ames Dept. Stores, Inc.*, 306 B.R. 43, 66 (Bankr.S.D.N.Y. Feb. 26, 2004) ("It is well established that when a statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); *see also Garcia v. Teitler*, 443 F.3d 202 (2d Cir.2006) (In interpreting a statute, a court should assume that Congress legislated against a background of law already in place and the historical development of that law).

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Because plaintiff fails to claim gender-based discrimination and fails to offer support for extending the Equal Pay Act beyond the clear language of the statute, plaintiff's Equal Pay Act claim is dismissed for failure to state a claim upon which relief can be granted.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss is granted, and plaintiff's complaint is dismissed in its entirety with prejudice.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
September 27, 2006

APPENDIX C — LETTERS FROM THOMAS J. LeBLANC OF THE UNIVERSITY OF ROCHESTER TO PROFESSOR GOVIND S. MUDHOLKAR, PROGRAM IN STATISTICS

UNIVERSITY OF ROCHESTER
THE COLLEGE
ARTS • SCIENCES • ENGINEERING

Thomas J. LeBlanc
Robert L. and Mary L. Sproull Dean of the College Faculty

June 2004

Professor Govind S. Mudholkar
Program in Statistics

Dear Professor Mudholkar:

I write to inform you that, effective July 1, 2004, your base salary will be $82,722 for the academic year, of which you will actually be paid fifty percent ($41,361) in twelve installments during the period July through June.

Sincerely,

s/ Tom
Thomas J. LeBlanc

Appendix C

UNIVERSITY OF ROCHESTER
THE COLLEGE
ARTS • SCIENCES • ENGINEERING

Thomas J. LeBlanc
Robert L. and Mary L. Sproull Dean of the College Faculty

June 11, 2002

Professor G. S. Mudholkar
Program in Statistics

Dear Professor Mudholkar,

I write to inform you that beginning July 1, 2002, your salary for the academic year will be $79,508.

I understand that your original grievance within the University is still in process. Pending the outcome of that grievance, and assuming that you continue to refuse to accept any undergraduate teaching assignments, I would propose that we continue the arrangement whereby you receive two-thirds of your academic year salary as pay for graduate teaching and research, and forego one-third of your salary. Therefore, your actual payment for the coming academic year will be $53,005. We should revisit this arrangement once your grievance is concluded, or if your teaching plans change.

Sincerely,

s/ Tom
Thomas J. LeBlanc